

## **DISCLAIMER**

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## **PETITION OF**

**KENTUCKY UTILITIES COMPANY  
d/b/a OLD DOMINION POWER COMPANY**

**CASE NO. PUE960303**

**For injunctive relief and/or  
declaratory judgment**

## **REPORT OF HOWARD P. ANDERSON, JR.**

### **HEARING EXAMINER**

**October 19, 1998**

On November 20, 1996, Kentucky Utilities Company, (“Kentucky Utilities” or “KU”) doing business in Virginia as Old Dominion Power Company (“ODP” or “KU/ODP”) filed a Petition requesting the State Corporation Commission (“Commission”) to enjoin Powell Valley Electric Cooperative (“PVEC” or “Powell Valley”) from selling or delivering electric power to Sigmon Coal Company, Inc. (“Sigmon” or “Sigmon Coal”) or to declare that the current sale of electric power by PVEC to Sigmon Coal’s mining operations in ODP’s service territory is a violation of the Utility Facilities Act and ODP’s rights thereunder.

By order dated December 13, 1996, the Commission docketed the Petition, assigned the matter to a Hearing Examiner, and established a procedural schedule for the filing of a joint stipulation of facts, a list of legal issues in dispute, and briefs on the disputed legal issues raised in this matter.

Following discovery and several extensions of the procedural schedule, the parties were unable to reach agreement on a joint stipulation of facts and a list of legal issues in dispute. On November 21, 1997, Powell Valley filed a Motion to Dismiss, asserting that the Commission lacked jurisdiction over the Tennessee Valley Authority (“TVA”), a federal corporation, and therefore lacked jurisdiction over a three party contract between TVA, Sigmon Coal, and Powell Valley.

By Ruling dated December 12, 1997, Powell Valley’s Motion to Dismiss was taken under advisement and a new procedural schedule was placed into effect. The hearing on this matter was convened as scheduled on March 12, 1998. Counsel appearing were Kendrick R. Riggs and Richard F. Newell for ODP; William C. Carriger, Mark W. Smith, Donald M. Schubert, Calvin F. Major, and David H. Stanifer for Powell Valley; and C. Meade Browder, Jr. for the Commission Staff. Post-hearing briefs were filed on or before May 12, 1998. A transcript of the hearing is filed with this Report.

## **STATEMENT OF THE CASE**<sup>1</sup>

Kentucky Utilities is an investor-owned public utility engaged in producing and selling electric power in both Virginia and Kentucky, and as noted above, transacts business in Virginia under the name of Old Dominion Power Company. ODP provides retail electric service to approximately 28,600 customers in five counties in southwest Virginia, including portions of Lee County, Virginia.

PVEC is a Virginia electric cooperative that provides retail electric service in northeast Tennessee and southwest Virginia, including portions of Lee County, Virginia. PVEC purchases all of its wholesale power from the TVA; therefore, the Commission regulates the service, but not the retail rates of PVEC.<sup>2</sup>

Since 1945, PVEC has been a retail distributor of electric power purchased at wholesale from TVA. Beginning November 1, 1985, PVEC has furnished electric service to Sigmon at delivery points located in the Calvin area. Effective April 1, 1988, PVEC and Sigmon Coal entered into a contract under which PVEC furnished electric service at a second delivery point in the Belcher Mine area. These delivery points are located in PVEC's service territory in Lee County, Virginia.

Sigmon Coal operates an integrated mining operation over a contiguous area in Kentucky and Virginia that includes the service territories of KU/ODP and PVEC.<sup>3</sup> Sigmon Coal owns and operates its own private electrical distribution system and currently takes delivery of power from PVEC at a location identified as the Sigmon Delivery Point. From this delivery point, located in PVEC's service territory, Sigmon distributes the power over its own distribution system to its coal preparation plant and numerous mining operations in various parts of its mining property. As mining locations change and mines open and close and reopen again, Sigmon alters the distribution system as needed to meet the operation's power needs.<sup>4</sup> All of the power is metered at the delivery point, and Sigmon gets one monthly bill from PVEC for all of the power used throughout its mining property. (Ex. No. RWM-5, Tab 22).

Sigmon, for its mining operations, uses independent contractors to extract coal from their various mines. The coal is then turned over to Sigmon for processing, sale and delivery. Sigmon

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<sup>1</sup>As noted above, KU/ODP and PVEC could not agree on a stipulation of facts, therefore the scenarios presented by both sides will be presented herein.

<sup>2</sup>Maps depicting the respective service territories are designated Ex. Nos. RWM-6 and WRP-10.

<sup>3</sup>Sigmon's mining operations in Kentucky are located in the service territory of Kentucky Utilities. In Virginia, the area mined by Sigmon Coal and its affiliate, Jeircol Mining, Inc. spans the Lee County service territories of both ODP and PVEC.

<sup>4</sup>PVEC witness Meyers points out that it has been common practice for a mining operation in Lee County to take delivery of power from its supplier at a delivery point and to install and maintain a private distribution system beyond that delivery point. This practice gives the mining operation the necessary flexibility to alter its private distribution system when its mining locations or electricity needs change. (Ex. No. RWM-5, at 17 and Tab 23).

owns the mineral rights, plans the development of operations, and obtains the necessary permits for each mining site. (Ex. No. DB-8, at 3, 4).

In 1992, Sigmon had plans to construct a new coal preparation plant in the service territory of ODP. Randell Meyers, general manager of PVEC, contacted Rosemary Henderson, utility specialist at the Commission, and posed the following question: Is PVEC authorized to furnish electric service to Sigmon Coal at a delivery point located in territory assigned to PVEC for use at facilities located outside that territory? Mr. Meyers testified that Commission Staff advised that PVEC could furnish electric service to facilities located in the territory assigned to ODP through a delivery point located in territory assigned to PVEC. (Ex. No. RMW-5, at 8).

The ensuing discussions between PVEC and Sigmon Coal also included electric service for additional future Sigmon Coal mining operations through the single delivery point. As a result of these discussions, PVEC planned the construction of a new substation and a single delivery point, eventually referred to as the “Sigmon Delivery Point.” Sigmon Coal began receiving its electricity at the new Sigmon Delivery Point on January 18, 1993 from PVEC pursuant to a contract with PVEC and TVA.

In May of 1993, four months after PVEC began furnishing electricity to Sigmon Coal through the new delivery point, Kentucky Utilities challenged PVEC’s service to Sigmon Coal. On May 11, 1993, Kentucky Utilities, through its attorneys, wrote PVEC demanding that it cease service to Sigmon Coal by June 1, 1993. (Ex. No. RWM-5, at Tab 16). By letter dated June 25, 1993, KU filed an informal complaint with the Commission against PVEC. The Commission Staff, by letter dated July 21, 1993, determined that PVEC’s service to Sigmon Coal was in PVEC’s service territory and that no action on the informal complaint would be taken. (*Id.* at Tab 19). Based on this decision, PVEC instituted steps for the development of a new substation (Keokee) to be constructed in close proximity to the Sigmon Delivery Point. (Ex. No. RWM-5, at Tab 13).<sup>5</sup>

ODP had supplied power to Sigmon Coal since 1985, when Sigmon Coal first acquired mineral rights to properties near Calvin in Lee County, Virginia and in Harlan County, Kentucky. The electric power for Sigmon Coal’s Virginia operations was supplied from ODP’s Calvin Substation, while Sigmon’s Kentucky operations were supplied from ODP’s Keokee Substation, both located in Virginia.

According to KU/ODP, PVEC’s “plan of action” to “capture” Sigmon Coal as a customer was conceived in 1992 and implemented during the ensuing three and one half years as follows:

Neither PVEC nor TVA has, in the Calvin/Keokee area, the transmission facilities required to serve Sigmon’s load. Initially they (PVEC and TVA) hoped to supply Sigmon’s requirements, including a new coal washing plant in ODP’s territory, from PVEC’s distant Wright Stone Creek substation, via PVEC’s distribution line serving

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<sup>5</sup>As of October 17, 1996, PVEC had incurred approximately \$630,000 in construction costs for the Keokee Substation and related facilities. (Ex. No RWM-5, at 15).

rural residential customers in its territory near the ODP territorial boundary.

When the [Sigmon Coal's] preparation plant was put into service in early January of 1993, it received its power supply from ODP. Sometime later that month, however, it was disconnected from ODP's system, without warning, and put onto the PVEC system. When PVEC tried to increase the load, . . . its residential customers began complaining and PVEC had to have Sigmon transfer approximately half of the load back to ODP. . . .

PVEC concluded that it could not adequately supply power to all Sigmon's contract-mining operations with its existing facilities and that, . . . the best solution was to construct a new substation in PVEC's territory as close as possible to the mining operations located in ODP's territory. TVA, at PVEC's urging, contacted ODP and requested a new wholesale power delivery point for a new PVEC substation, near the Calvin area, to replace the existing distant facility at Wright Stone Creek. . . .

Brief at 4, 5.

On or about October 12, 1996, PVEC and TVA disconnected ODP's power supply to Sigmon Coal and PVEC began providing power for all of Sigmon Coal's operations in Virginia and Kentucky. According to ODP, PVEC's takeover of Sigmon Coal's power supply idled ODP's Calvin Substation<sup>6</sup> completely and also idled much of ODP's Keokee Substation and connecting transmission capacity. (Tr. 267, 268). The new PVEC Substation is approximately 1,500 to 2,000 feet from ODP's Calvin Substation. (Tr. 108).

### **MOTION TO DISMISS**

On November 21, 1997, PVEC filed a Motion to Dismiss ("Motion") the Petition of Kentucky Utilities for failure to state a claim upon which relief may be granted. In support of its Motion, PVEC argues that the Commission lacks jurisdiction over the TVA and the requested relief would substantially interfere with TVA's contracting authority. Specifically, PVEC maintains that KU/ODP makes a state law challenge to PVEC's participation in a power contract of the TVA, a federal corporation created pursuant to the Tennessee Valley Authority Act of 1933 (the "TVA Act"). PVEC maintains that the TVA Act preempts the Commission's jurisdiction over its participation in this federal contract between TVA, PVEC, and Sigmon. As such, according to PVEC, this matter is not susceptible to review under the Virginia Utility Facilities Act, but is governed by the federal TVA Act.

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<sup>6</sup>PVEC states that, through contributions in aid of construction, Sigmon Coal paid for the construction of the Calvin Substation. (Ex. No. RWM-5, at Tab 8).

PVEC further argues that KU/ODP has acknowledged the overriding federal jurisdiction by filing a separate action, *Kentucky Utilities v. Tennessee Valley Authority and Powell Valley Electric Cooperative*, (No. 96-492) in the United States District Court for the Eastern District of Kentucky. In conclusion, PVEC argues that this Commission is not the appropriate forum for the resolution of this dispute, as TVA's direct participation in the contract clothes the contract with an overriding federal interest that precludes state regulation. (Motion at 3).

Section 10 of the TVA Act, 16 U.S.C.A. Section 831i, establishes the contracting authority of TVA and provides, in relevant part:

The [TVA] Board is empowered and authorized to sell the surplus power not used in its operations, . . . to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; . . . [and] the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this chapter. . . .

16 U.S.C.A. Section 831i.

PVEC states that the Sigmon contract is clearly an exercise of TVA's Section 10 authority, and under the Supremacy Clause of Article VI of the United States Constitution, the Commission has no authority to regulate this particular TVA contract. In support of its Motion, PVEC cites numerous cases, including a case decided by this Commission, which hold that billing charges, minimum bill provisions, limitation of liability clauses, and other contracting decisions of the TVA are a matter of federal law and that states may not modify or interfere with these contracts.<sup>7</sup>

This Commission held, in *Application of Powell Valley Electric Cooperative*, Case No. PUA870069 (Dismissal Order dated November 9, 1987), that it has no jurisdiction over the rates of PVEC, which are established pursuant to the TVA Act. Similarly, PVEC requests that the Commission recognize that it has no authority over PVEC's participation in a power contract between TVA, PVEC and Sigmon Coal and dismiss this petition.

Federal preemption of state regulation may occur where: (1) Congress expressly preempts state law; (2) Congress legislates so comprehensively as to occupy a given field completely; or (3) state law conflicts with federal law and compliance with both is impossible, or state law is an obstacle to accomplishing and executing Congressional purposes and objectives.<sup>8</sup>

The TVA Act does not expressly preempt state territorial laws. Therefore, the Virginia Utility Facilities Act does not directly conflict with federal authority. Furthermore, the TVA Act does not grant any retail service rights to rural electric cooperatives. Instead, it simply authorizes

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<sup>7</sup>*Ferguson v. Electric Power Board of Chattanooga*, 378 F. Supp. 787 (E.D. Tenn. 1974), aff'd, 511 F. 2d 1403(6<sup>th</sup> Cir.1975); *Mobil Oil Corp. v. Tennessee Valley Authority*, 387 F. Supp. 498 (N.D. Ala. 1978); *Monsanto Co. v. Tennessee Valley Authority*, 455 F. Supp. 343, 346 (N.D. Ala. 1978).

<sup>8</sup>*California v. ARC America Corp.*, 490 U. S. 93, 100-01 (1989).

sales of surplus power, and directs the TVA board to set out the terms under which the sale may occur. Service territories have historically been encompassed within the police power reserved to the states, and there is a strong presumption against finding federal preemption in areas traditionally subject to state police powers.<sup>9</sup>

Clearly, the TVA Act permits the TVA to enter into contracts for the sale of its surplus power to electric cooperatives and to set the resale rates charged for this power. (16 U.S.C.A. Section 831i). Thus, the TVA Act preempts state law in the area of setting retail electric rates and contracting for the sale of its power. PVEC asserts that KU/ODP's complaint in this case constitutes interference with PVEC's participation in a power contract with the TVA. KU/ODP responds by maintaining that it is not asking the Commission to exert jurisdiction over a TVA contract, rather the issue pertains to the alleged invasion of service territories which are determined by state law.

Under state law, there are three recognized tests for resolving disputes among utilities where a customer has facilities located within the exclusive territory of two adjoining utilities. The Colorado Supreme Court has described the tests as follows:

The point of service [or "point of delivery"] test focuses on the point at which electricity is delivered rather than on the point at which it is consumed. If a utility provides electricity to a customer within its certificated territory, the sale is proper, even if the customer transports the electricity into the certificated territory of another utility for the customer's use. (citations omitted).

The geographical load center test is defined as 'a theoretical point determined by giving consideration to the location of the permanent electric loads which have been or which will be installed within a reasonable time as part of existing plans.' (citations omitted). In effect, this test permits the utility which serves a majority of a customer's load to serve the entire load, regardless of the territorial boundaries of a service area.

The point of use test requires that only the utility authorized to serve within a certificated territory may provide power to a facility within that territory. Thus, this test strictly enforces the territorial boundaries of regulated utilities in the provision of their electric service. (citations omitted).

*Public Service Company of Colorado v. Public Utilities Commission of Colorado*, 765 P. 2d 1015, 1019 (Colo. 1988)

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<sup>9</sup>*Munn v. Illinois*, 94 U.S. 113 (1877); *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 141 (1939); *Arkansas Elec. Coop. Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983); *General Motors Corp. v. Tracy*, 117 S. Ct. 811, 827-28 (1997).

ODP advocates a decision based on the point of use test. Although the load center test would seem to favor ODP in serving Sigmon Coal, ODP does not contend it should serve any of Sigmon's load in PVEC's territory. (Tr. 51-52, 63-64, 233-234). ODP notes however that, at least as late as the time of the hearing in this matter, there were no active mining operations inside PVEC's service area. (Brief at 12). PVEC, of course, advocates the point of delivery test.

PVEC argues that its service to Sigmon is valid under each of the three recognized tests for deciding service territory disputes between two adjacent utilities. First, PVEC states that its service to Sigmon satisfies the point of delivery test because the delivery point is clearly within PVEC's service territory. Second, PVEC also claims that its service to Sigmon satisfies the point of use test. In support of this claim, PVEC points out that, although Sigmon's mining operations are located in three different service territories, Sigmon distributes its power across these service territories by means of its own distribution system. Finally, PVEC maintains that its service to Sigmon satisfies the geographic load center test because the majority of Sigmon's current and future electric load in Lee County, Virginia lies within territory assigned to PVEC.

ODP refutes this last point with the testimony of William R. "Mike" Palmer, a registered engineer and registered land surveyor in Kentucky and Virginia, with approximately thirty years' experience in both fields specifically related to the coal mining industry.<sup>10</sup> The purpose of Mr. Palmer's testimony is to show that the mineral leases held by Sigmon Coal do not constitute a single, integrated or contiguous mining operation. Mr. Palmer also testified that the majority of Sigmon's current and future electric loads do not lie within the territory assigned to PVEC. Based on his research, Mr. Palmer states that, assuming the Harlan/Wilson Seam Mine ceased producing coal, there currently is no mining activity on Sigmon properties in PVEC's service territory. On the other hand, Sigmon has mineral leases on both the KU/ODP and PVEC service territories in Virginia. However, as portrayed by Mr. Palmer, these operations do not comprise a single, integrated coal mining operation. Instead, Mr. Palmer states that the mines are separate and distinct, and are operated by independent mining companies. (Ex. No. WRP-10, at 8).

Virginia law applicable to this case is found in the Utility Facilities Act (Chapter 10.1 of Title 56 of the Code of Virginia). Section 56-265.3 of the Code of Virginia provides:

No public utility shall begin to furnish public utility service within the Commonwealth without first having obtained from the Commission a certificate of public convenience and necessity authorizing it to furnish such service.

Section 56-265.4 of the Code of Virginia provides:

[N]o certificate shall be granted to an applicant proposing to operate in the territory of any holder of a certificate unless and until it shall be proved to the satisfaction of the Commission that the service rendered

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<sup>10</sup>Mr. Palmer developed his testimony from a review of public records on file at the Harlan County, Kentucky and Lee County, Virginia courthouses; the Kentucky Department of Surface Mining Reclamation and Enforcement; and the Virginia Department of Mines, Minerals and Energy.

by such certificate holder in such territory is inadequate to the requirements of the public necessity and convenience; and if the Commission shall be of opinion that the service rendered by such certificate holder in such territory is in any respect inadequate to the requirements of the public necessity and convenience, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy before any certificate shall be granted to an applicant proposing to operate in such territory.

The Virginia Supreme Court, in *Town of Culpeper v. Virginia Electric and Power Company, et al.*, 215 Va. 189, 207 S.E. 2d 864 (1974), decided the question of whether certificates granted by the Commission are governmental franchises creating property rights that are entitled to protection of law. The Court found that “a certificate of public convenience and authority [issued by the Commission] is a franchise and is a property right. As such it is entitled to the protection of the courts.” (*Id.* at 194). The Court went further to observe that:

utilities not only have a right to provide services to the area covered by their franchises, but are charged by law with a duty to furnish such services. In [the] discharge of this duty they must provide for existing and current needs of customers, and anticipate future needs and growth, necessitating large expenditures in capital outlay.

*Id.* at 196.

The Commission recently issued its order in *Prince George Electric Cooperative for declaratory judgment and Petition of RGC (USA) Mineral Sands, Inc. and RGC (USA) Minerals, Inc. for declaratory judgment*, Case No. PUE960295 (Final Order June 25, 1998) (“*Prince George*”), a case involving a similar situation. *Prince George* and this case both involve a situation in which a large customer desires to purchase its electricity from a supplier other than the certificated electric company. Although *Prince George* involved the same legal issue, there are factual differences between the two cases. First, in *Prince George*, the customer (RGC Minerals) was a new customer. In this case, Sigmon is an existing customer of all three utilities. Because RGC Minerals was a new customer, the certificated supplier, Prince George, did not lose a current customer or existing revenues. In contrast, KU/ODP has lost the actual revenues of a current customer as a result of Sigmon’s switch to PVEC.

Second, because Sigmon Coal was an existing customer of KU/ODP, existing KU/ODP facilities have been idled and therefore stranded. Specifically, ODP’s Calvin Substation is completely idle and much of ODP’s Keokee Substation and connecting transmission capacity is idle. (Tr. 267, 268). Additionally, PVEC’s own Wright Stone Creek Substation was removed from service following the construction of PVEC’s new Keokee Substation built to serve the entire Sigmon Coal load. Notably, KU/ODP points out that PVEC’s new substation is within sight of and less than a quarter mile from ODP’s idled substation. Additionally, the line built from PVEC’s new substation to Sigmon’s new preparation plant constitutes further duplication of facilities. (Ex. No. RMH-11, at 21; Tr. 268, 69).



Third, Sigmon takes delivery of the power from PVEC at a delivery point within PVEC's service territory. In Prince George, RGC purchased a strip of land to connect with the service territory of Virginia Power to establish its delivery point.

The primary distinction is the fact that, in this case, Sigmon is purchasing its power from the TVA, a federal entity, pursuant to a contract between the TVA, PVEC and Sigmon.

PVEC argues that this case involves a simple matter of customer choice to consolidate power supply. However, under current Virginia law retail customers do not have a choice of electric service providers. KU/ODP claims that, even if the Utility Facilities Act was repealed and customer choice became law, the genuineness of customer choice in this situation should be questioned. KU/ODP further claims that the "competition" for Sigmon Coal in this case is also unfair because ODP's rates and services are regulated, while PVEC's rates and services are not.

The Commission has jurisdiction under the Utility Facilities Act to determine the service territories of electric utilities operating in Virginia. However, the Commission does not have jurisdiction over the rates charged and conditions imposed by PVEC because PVEC purchases its power from TVA, a federal entity. The TVA Act specifically grants the TVA board the authority to set the rates, terms and conditions pertaining to the sale of its power.<sup>11</sup>

Under Virginia law, the certificated utility has the exclusive right and duty to serve customers within its service boundaries. In this case, Sigmon receives all of its power from PVEC and uses that power by means of its own distribution system across the Virginia-Kentucky state line and across the service territories of three electric service providers (PVEC, ODP and KU).

States with exclusive service territories have held that a customer cannot accomplish indirectly what the law forbids them to do directly. Moreover, courts have held that a private company may not construct a line to a point outside the city limits to obtain electrical service from a utility that was not authorized to provide electrical service within the municipality. In Tennessee, the court held that the place of delivery is not controlling, but rather the place and the purpose of its use must be the controlling factor. *Holston River Electric Company v. Hydro Electric Corporation*, 17 Tenn. App. 122, 66 S.W. 2d 217 (1933).

Unless the delivery point test is applied, Powell Valley is in clear violation of the Virginia Utility Facilities Act by providing electricity to a customer (Sigmon) for use in the service territories of Old Dominion Power and Kentucky Utilities. In regards to Kentucky Utilities' service territory, Powell Valley is supplying power for use across the state line in Kentucky, an action for which it clearly has no state authority.

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<sup>11</sup> Section 831i of the TVA Act grants the TVA board authority to enter into contracts for the sale of surplus power not used in its operations to "cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members" among others. (16 U.S.C.A. Section 831 *et seq.*) The section authorizes the board to "include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act. . . ."

However, this case involves a contract with the TVA, a federal entity. The majority of federal cases involving the TVA pertain to the TVA board's authority to set rates, terms and conditions for the resale of its electricity. For instance, the U.S. Supreme Court and the lower federal courts have held, based on the supremacy clause of Article VI of the United States Constitution, that the TVA board's authority to propose resale rate schedules cannot be limited by state legislatures. *Johnson v. Maryland*, 254 U.S. 51, 41 S.Ct. (1920); *Tennessee Valley Authority v. Kinzer*, 142 F. 2d 833 (6<sup>th</sup> Cir. 1954); *Posey v. Tennessee Valley Authority*, 93F. 2d 726 (5<sup>th</sup> Cir. 1937); *Rainbow Realty Co. v. Tennessee Valley Authority*, 124 F. Supp. 436 (M.D. Tenn. 1954); *Ferguson v. Electric Power Board of Chattanooga, Tenn.*, 378 F. Supp. 787 (1974). This is because the TVA's right to sell electric power rests on the constitutional right of the United States to dispose of its property. *Ashwander v. Tennessee Valley Authority*, 56 S. Ct. 466 (1936); cited in *Georgia Power Co. v. Tennessee Valley Authority et al.* 14 F. Supp. 673 (N.D. Ga. 1936).<sup>12</sup> To this end, the TVA board has such broad discretion in setting rates, terms and conditions for the resale of its electricity that its decisions are not subject to judicial review, but are subject only to Congressional oversight. *Mobil Oil Corp. v. TVA*, 387 F. Supp. 498 (N.D. Ala. 1974).

According to the evidence in this case, the bulk of Sigmon's electric use is located outside PVEC's service territory.<sup>13</sup> Enforcement of Virginia's Utility Facilities Act, in this instance, would result in significant interference with, and perhaps nullification of the contract between the TVA, PVEC and Sigmon. Based on the authority cited above and the TVA's federal authority to enter into contracts for the sale of its power, I find that the contract between the TVA, Powell Valley and Sigmon Coal cannot be limited by this Commission. Therefore, PVEC's Motion to Dismiss should be granted.

### **MOTION TO STRIKE CLAIM FOR DAMAGES**

In its Petition, KU/ODP requests the Commission to assess damages against PVEC for the loss it has sustained as a result of PVEC's alleged violation of the Utility Facilities Act. No legal basis for such damages is cited as required by Commission Rule 5:15(b)(ii). KU/ODP, in its brief, states that it withdraws its request for damages.<sup>14</sup> KU/ODP further requests that the Commission fine PVEC pursuant to Section 56-265.6 of the Code of Virginia. Specifically, KU/ODP asserts that PVEC has willfully violated the Utility Facilities Act, and should be fined \$1,000 for every mining operation in ODP's exclusive service territory to which PVEC has unlawfully provided service.

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<sup>12</sup>In marketing electricity, the TVA is disposing of property of the United States which is a function vested by the Constitution in the Congress. *Mobil Oil Corporation V. Tennessee Valley Authority*, 387 F. Supp. 498 (N.D. Ala. 1974); *AFG Industries, Inc. v. Holston Electric Co-op*. 556 F. Supp. 33 (E.D. Tenn. 1982).

<sup>13</sup>In 1959, the TVA Act was amended to, in essence, limit the TVA in its sale of electricity to areas in which it was the primary source of power supply as of July 1, 1957. (Section 15d(a) of the TVA Act of 1933). As previously noted, Kentucky Utilities has filed an action in the United States District Court for the Eastern District of Kentucky, London Division, (Civil Action No. 96-492) contesting the TVA's authority pursuant to § 15d(a) of the TVA Act to provide electric service in the territory encompassed by Sigmon Coal. This action was still pending as of the hearing date in this proceeding.

<sup>14</sup>Brief at 34, n. 112.

After review of Section 56-265.6 of the Code of Virginia, I find that a fine against PVEC would not be appropriate under the facts and circumstances of this case. As noted herein, PVEC's tactics are certainly aggressive. However, because PVEC sought and obtained informal Commission approval for its point of delivery service to Sigmon, these actions do not, in my opinion, constitute a willful violation or a refusal to observe the laws of this State.

Based on the law and the evidence in this case, I find that:

1. The Petition of Kentucky Utilities Company d/b/a Old Dominion Power Company's Petition for Injunctive Relief and/or Declaratory Judgment should be denied;
2. Powell Valley Electric Cooperative's Motion to Dismiss should be granted; and
3. Powell Valley Electric Cooperative should not be penalized or fined for its actions.

In accordance with the above findings, ***I RECOMMEND*** that the Commission enter an order that:

1. ***ADOPTS*** the findings contained in this Report;
2. ***GRANTS*** Powell Valley Electric Cooperative's Motion to Dismiss;
3. ***DENIES*** Kentucky Utilities Company d/b/a Old Dominion Power Company's Petition for injunctive relief and/or declaratory judgment against Powell Valley; and
4. ***DISMISSES*** this case from the Commission's docket of active proceedings and passes the papers herein to the file for ended causes.

### **COMMENTS**

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and Commission Rule 5:16(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within fifteen (15) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P. O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all other counsel of record and to any party not represented by counsel.

Respectfully submitted,

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Howard P. Anderson, Jr.  
Hearing Examiner